IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1078 OF 2002

(THROUGH JAIL)

David Joseph Kitina,
Convicted Prisoner, Presently at
Nashik Road Central Prison,
Nashik - 422 101. ...Appellant

Versus

The State of Maharashtra ...Respondent

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Mrs.Rachita R.Dhuru, appearing as amicus curiae for Appellant.

Mr.S.S.Tatkare for Respondent.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 16, 2006.

ORAL JUDGMENT :

1. Heard Counsel for the Appellant, who is appearing as amicus curiae.

2. This Appeal takes exception to the Judgment and Order passed by the Special Judge, Greater Bombay dated March 19, 1997 in NDPS Special Case No.180 of 1994 recording finding of guilt against the Appellant for offence punishable under

Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') and ordering him to undergo rigorous imprisonment for a term of 10 years and to pay a fine of Rs.1,00,000/- (Rupees One Lakh) and in default of payment of fine, to undergo additional sentence of rigorous imprisonment for a term of two years.

3. The prosecution case is that on prior information received by API Parmar, trap was laid for accosting the suspect in the vicinity of J.B.Petit High School, A.K.Naik Marg, Mumbai at about 15.40 hours on 15th July 1994. The accused walked into the trap and was searched after due observance of the mandate of Section 50 of the NDPS Act. He was found in possession of 15 gms of heroine and cash of Rs.1,000/- (Rupees One Thousand). The said articles were seized by the Police on the spot and the accused was arrested after disclosing him the reason for arrest. Samples were drawn from the contraband seized and forwarded to the Chemical Analyser.

4. It is not necessary to burden this Judgment with other facts as in my opinion, the Appellant ought to succeed on the short question that the prosecution has failed to establish in evidence that mandatory procedure required in terms of Section 42 of the NDPS Act has been complied with. Insofar as this aspect is concerned, the main evidence with regard to compliance of Section 42 is only of P.W.1 Suresh Gopalrao Thakare, PSI. P.W.1 was attached to Narcotic Cell of Azad Maidan Unit as PSI at the relevant time. In his examination-in-chief, he has deposed that in the morning of 15th July 1994 when he reported to duty in the Office of Sr.PI Arote, API Parmar was present. The informant then approached API Parmar at around 1.55 p.m. and gave requisite information to API Parmar. He has then deposed that API Parmar then conveyed this information to Sr.PI Arote, who in turn, called P.W.1, PSI Suryavanshi, PSI Kale and other staff and disclosed that there was information that one negro person aged about 20-22 years of slim built, wearing sky blue coloured shirt and blue coloured jeans was likely to arrive at J.B.Petit High School at around 3.30 to 4.00

p.m. for the purpose of narcotic deal. It is then deposed by P.W.1 that Sr.API Arote then instructed Havildar Hari Anna Ikke to get the panchas. Besides, Sr.PI Arote reduced the said information in writing in the information book maintained for recording such information. It is stated that he (Sr.PI Arote) then conveyed this information to his superiors Assistant Commissioner of Police (ACP) and Deputy Commissioner of Police (DCP), Narcotic Cell. This is the material evidence of P.W.1 in the examination-in-chief with regard to compliance of Section 42(2) of the NDPS Act, which mandates that where an Officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior. In the cross-examination, this witness has however deposed that API Parmar recorded the information and informed the Sr.PI Arote. It is further deposed that Sr.PI Arote (was) informed orally. In Paragraph 18 during cross-examination, P.W.1 has stated that Mr.Gaikwad was the ACP and Mr.Khemkar was the DCP at the relevant time. Sr.PI Arote

communicated the information received to ACP and DCP in writing. It is further deposed that office of ACP and DCP was in the same building where their Office was situated. It is further conceded by this witness that he does not remember who had taken such written communication of the information to ACP and DCP. He then deposed that Sr.PI Arote had talked with ACP on telephone, however, concedes that he did not know what conversation took place between Sr.PI Arote and DCP on telephone. Here, it is necessary to mention that in the cross-examination, this witness has virtually accepted that he was not aware about exact number of members of the raiding party. He has also accepted that he did not remember name of another panch, who participated in drawing the panchnama. He did not remember the direction in which the vehicle was parked. He was not in a position to give the name of teh manufacturer of the English Typewriter which was taken to the site.

5. Be that as it may, for the purposes of considering the question as to whether the prosecution has established material facts

regarding compliance of mandatory requirement of Section 42(2) of the NDPS Act, on analysing the evidence on record, I have no hesitation in taking the view that the prosecution has failed to establish that position. This is so because as is rightly contended by the Appellant, the log book on which the information was allegedly recorded by Sr.PI Arote is not produced nor proved in evidence. Sr.PI Arote who is stated to have reduced the information in writing is not examined. Insofar as whether intimation was sent by Sr.PI Arote in writing to his superiors, the prosecution evidence cannot be accepted as compliance of requirement of Section 42 of the NDPS Act. Indeed, in the examination-in-chief, P.W.1 has stated that Sr.PI Arote conveyed the information to his superiors ACP and DCP but has not clearly mentioned as to whether that intimation was sent in writing. In the cross-examination, same witness has accepted that API Parmar had recorded the information and informed Sr.PI Arote, which stand is contrary to the case made out in the examination-in-chief. The fact that the Office of ACP and DCP was in the same building will make no difference because the

prosecution is obliged to establish in evidence that the copy of intimation was immediately sent to superior officials within the specified time. That evidence has not been produced. On the contrary, P.W. 1 has accepted in the cross-examination that he did not remember who had taken such written communication of the information of ACP and DCP. If this is the nature of evidence regarding compliance of mandatory requirement of Section 42(2), this Court has no option but to set-aside the conclusion reached by the Trial Court and instead, order that the Appellant is acquitted and be set at liberty forthwith.

6. Appeal accordingly succeeds. Impugned Judgment and Order is set-aside. Appellant is acquitted of the charge. Appellant be set at liberty forthwith.

7. Office to send intimation on the basis of the operative order to the appropriate persons to release the Appellant forthwith. Copy of this order be forwarded to the Appellant/accused as this Appeal is filed through jail.

8. Court expresses word of appreciation for the Advocate who has appeared as amicus curiae to espouse the cause of the Appellant.

A.M.KHANWILKAR, J.